

# No More Kidding Around: Restructuring Non-Medical Childhood Immunization Exemptions to Ensure Public Health Protection

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“A lot of states call their exemptions religious, but anyone who wants it, gets it.” – Daniel A. Salmon, M.P.H., Johns Hopkins University School of Public Health<sup>1</sup>

## I. INTRODUCTION

The drastic reduction over the past century in morbidity and mortality due to vaccine preventable illnesses is considered one of the most momentous achievements of public health.<sup>2</sup> In the United States, much of this success can be credited to the commitment of lawmakers to the principle of compulsory vaccination as a prerequisite to school enrollment.<sup>3</sup> And yet, while this legislation has led to great improvement in the public's health, there are political and practical complexities that now threaten these

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1. Donald G. McNeil Jr., *Worship Optional: Joining a Church to Avoid Vaccines*, N.Y. TIMES, Jan. 14, 2003, at F1.

2. See CTR. FOR DISEASE CONTROL & PREVENTION, MORBIDITY & MORTALITY WKLY. REP., ACHIEVEMENTS IN PUBLIC HEALTH, 1900-1999 621 (July 30, 1999); CTR. FOR DISEASE CONTROL & PREVENTION, MORBIDITY & MORTALITY WKLY. REP., TEN GREAT PUBLIC HEALTH ACHIEVEMENTS—UNITED STATES, 1900-1999 241 (Apr. 2, 1999); CTR. FOR DISEASE CONTROL & PREVENTION, MORBIDITY & MORTALITY WKLY. REP., ACHIEVEMENTS IN PUBLIC HEALTH, 1900-99 IMPACT OF VACCINES UNIVERSALLY RECOMMENDED FOR CHILDREN-U.S., 1990-1998 243 (Apr. 2, 1999).

3. James G. Hodge Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social and Legal Perspectives*, 90 KY. L.J. 831, 858 (2001-2002), available at <http://www.publichealthlaw.net/research/PDF/vaccine.pdf> (last visited Feb. 12, 2003); Kathryn M. Edwards, *State Mandates and Childhood Immunizations*, 284 JAMA 3171, 3172 (2000); Walter A. Orenstein & Alan R. Hinman, *The Immunization System in the United States -The Role of School Immunization Laws*, 17 VACCINE 19, 19 (Oct. 29, 1999).

hard-earned advances. Both the structure of the child immunization system and the program's bramble bush of legal, philosophical, and practical concerns contribute to the intricacies. This public health initiative relies upon three separate components: legislatures to pass laws designating vaccination requirements, state health departments and boards to help refine the mandates and exemption processes, and school districts and individual schools to carry out such mandates.<sup>4</sup> Childhood immunization policy also contemplates numerous complex, contentious, and controversial themes: a state's interest in protecting public health must be balanced against an individual's medical treatment considerations;<sup>5</sup> concepts of informed consent and personal autonomy<sup>6</sup> must be balanced against state mandates;<sup>7</sup> minor-patients' rights and public interests must be balanced against parental rights; and religious and personal philosophies must be balanced against science and medicine. Immunization policy also raises considerations of relative risks, errors of commission, and errors of omission.<sup>8</sup> The prospect of harmoniously resolving all of these concerns appears daunting.

The benefits of mandatory childhood immunization were obvious when there existed the threat of community members contracting deadly, naturally-occurring, debilitating diseases, such as smallpox and polio. Even so, opposition to vaccination in general, and mandatory vaccination in particular, existed.<sup>9</sup> However, as risks of contracting many deadly and

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4. See discussion *infra* Parts II-IV.

5. LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW AND ETHICS: A READER* 185-87, 190-91 (Lawrence O. Gostin ed., Univ. of CA Press 2002).

6. See generally Karin Schumacher, *Informed Consent: Should It Be Extended To Vaccinations?*, 22 T. JEFFERSON L. REV. 89 (1999); Kristine M. Severyn, *Jacobson v. Massachusetts: Impact on Informed Consent and Vaccine Policy*, 5 J. PHARMACY & L. 249 (1995); COMM. ON BIOETHICS, AM. ACAD. OF PEDIATRICS, INFORMED CONSENT, PARENTAL PERMISSION, AND ASSENT IN PEDIATRIC PRACTICE, 95 PEDIATRICS 314 (1995).

7. See Ross D. Silverman & Thomas May, *Private Choice Versus Public Health: Religion, Morality, and Childhood Vaccination Law*, 1 MARGINS 505, 505 (2001) ("State-enforced vaccination of children represents the exercise of civil authority over individual judgment."); Allison v. Merck, 878 P.2d 948, 954 (Nev. 1994). In this case, the Nevada Supreme Court highlighted the dilemma of mandates as a prerequisite to public and private school attendance:

Ms. Allison never had any real choice as to whether her son was to receive the vaccine . . . . Not only was she, let us say, 'strongly encouraged' to make the decision . . . she was faced with the Hobson's choice of either having the vaccine administered or not having the privilege of sending her son to private or public school. . . . Choosing not to have her son attend school, of course, would have subjected her to criminal penalties.

*Id.* at n.9.

8. See Jacqueline R. Meszaros et al., *Cognitive Processes and the Decisions of Some Parents to Forego Pertussis Vaccination for Their Children*, 49 J. CLINICAL EPIDEMIOLOGY 697 (1996).

9. See, e.g., Hodge Jr. & Gostin, *supra* note 3, at 12-14, 19-26 (describing opposition to vaccines that dates back to the mid-Eighteenth Century, when Dr. Edward Jenner first

crippling diseases continue to decline to near negligible levels,<sup>10</sup> and rates of childhood immunization continue to reach record levels, the public today places greater attention on the relative weaknesses and dangers of immunizations, and the systems through which they are administered.<sup>11</sup> While the total number of parents who actively seek out exemptions still remains relatively small, the numbers are rising dramatically,<sup>12</sup> and for myriad reasons.<sup>13</sup>

In spite of the heightened visibility and public knowledge of the need for robust public health systems arising out of bioterrorism preparedness efforts, the public health community continues to face growing skepticism toward its policies and programs. This is especially true when such policies threaten to encroach upon individual rights.<sup>14</sup> In addition, the increase in public health's national profile has not resulted in improvement of its resources: while state and local public health systems saw new federal funds devoted to preparedness efforts, state budget crises have led to drastic reductions in funds available to support "traditional" public health services. In some communities, these reductions have affected childhood immunization programs.<sup>15</sup> The public health system, and childhood

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discovered that exposure to cowpox could inoculate humans against smallpox); Michael R. Albert et al., *The Last Smallpox Epidemic in Boston and the Vaccination Controversy, 1900—1903*, 344 N. ENGL. J. MED. 375, 376-77 (2001). See generally GRAHAM S. WILSON, *THE HAZARDS OF IMMUNIZATION* (1967).

10. See Daniel A. Salmon & Andrew W. Siegel, *Religious and Philosophical Exemptions from Vaccination Requirements and Lessons Learned from Conscientious Objectors from Conscription*, 116 PUB. HEALTH REP. 289, 289 (2001).

11. Recent events surrounding the inclusion of provisions in the Homeland Security Act to protect vaccine ingredient manufacturers from lawsuits offers an excellent example of the concerns over vaccine risk and the fragile nature of public trust in public health systems. Homeland Security Act of 2002, Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-296, §§ 1714-1717 (2002) (rescinded by H.R.J. Res. 2, 108<sup>th</sup> Cong. (2003)). See, e.g., Susan Warner, *New Vaccine Clause Angers Parents of Autistic; Amendment Buried in Homeland Security Law Restricts Right to Sue Makers of Drug Preservative*, WASH. POST, Dec. 9, 2002, at A3; Jonathan Weisman, *A Homeland Security Whodunit; In Massive Bill, Someone Buried a Clause to Benefit Drug Maker Eli Lilly*, WASH. POST, Nov. 28, 2002, at A45; Nick Anderson, *First in Deal to Reverse Vaccine-Liability Decision; Provision to Benefit Drug Makers had Been a Late Addition to the Homeland Security Bill*, L. A. TIMES, Jan. 11, 2003, at 16. A broad discussion of the thimerosal-autism debate is beyond the scope of this article.

12. Salmon & Siegel, *supra* note 10, at 290.

13. See, e.g., Robert M. Wolfe et al., *Content and Design Attributes of Antivaccination Web Sites*, 287 JAMA 3245, 3246-247 (2002) (citing the most common claims "were that vaccines cause idiopathic illness . . . vaccines erode immunity . . . adverse vaccine reactions are underreported . . . and vaccination policy is motivated by profit". *Id.* at 3245); Barbara P. Yawn et al., *Barriers to Immunization in a Relatively Affluent Community*, 13 J. AM. BD. FAM. PRAC. 325, 325 (2000); Meszaros, *supra* note 8, at 698.

14. FRANK P. GRAD, *PUBLIC HEALTH LAW MANUAL* 72-73 (3d ed. Am. Public Health Assoc. 1997).

15. Victoria Stagg Elliott, *Public Health Funding: Feds Giveth but the States Taketh*

immunization programs in particular, find themselves in the paradoxical situation of being more prominent and successful; yet, more vulnerable than ever.

This article will examine the following: the legal and political foundations of the U.S. mandatory childhood vaccination system and non-medical exemptions to childhood vaccination; the mechanisms used to attempt to enforce proper use of religious exemptions; the availability of philosophical exemptions; and recent legal decisions in New York, Wyoming, and Arkansas that offer examples of significant threats to the long term health of the childhood immunization system. Finally, this article will conclude with policy options to reverse the trend toward increased use of non-medical childhood exemptions.

## II. CHILDHOOD IMMUNIZATIONS' LEGAL AND POLITICAL FOUNDATIONS

The United State Supreme Court case *Jacobson v. Massachusetts*,<sup>16</sup> established the right of the state to compel an individual to receive a vaccination.<sup>17</sup> In doing so, the Court recognized that the need to serve the "common good" confers to states broad powers that may restrain the rights of individuals.<sup>18</sup> However, the Court did not envision a boundless state power to protect the public's welfare. As James Hodge and Larry Gostin state, the *Jacobson* decision describes a state police power<sup>19</sup> that balances public health protections with the principles of necessity, reasonableness, proportionality, and harm avoidance.<sup>20</sup>

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Away, AM. MED. NEWS, Oct. 28, 2002, at 1.

16. 197 U.S. 11 (1905).

17. Ross D. Silverman, and Thomas May, *Private Choice Versus Public Health: Religion, Morality, and Childhood Vaccination Law*, 1 MARGINS 505 (2001).

18. [T]he liberty secured by the Constitution of the United States . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good . . . Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.

*Id.* at 26-27. See also Silverman & May, *supra* note 7, at 507-09; Etienne Vermeersch, *Individual Rights Versus Societal Duties*, 17 VACCINE 14, § 14-7 (1999); JOHN STUART MILL, ON LIBERTY 9 (Logman, Roberts & Green ed., 1999) (1869) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.").

19. Police power is "the ability of a state or locality to enact and enforce public laws regulating or even destroying private right, interest, liberty, or property for the common good (i.e., for the public safety, comfort, welfare, morals, or health)." William J. Novak, *Governance, Police, and American Liberal Mythology* (quoted in GOSTIN, *supra* note 5, at 190-91). See also *Morris v. City of Columbus*, 30 S.E. 850, 851-53 (Ga. 1989).

20. *Jacobson*, 197 U.S. at 25-40; Hodge Jr. & Gostin, *supra* note 3, at 35-36.

The U.S. Supreme Court and state supreme courts subsequently have determined that states and localities have the power to take significant steps to protect children from communicable disease, even to the extent of denying children the ability to attend public school.<sup>21</sup> Furthermore, the courts have upheld the right of states to require that children receive immunizations, even when such obligations conflict with both parental rights<sup>22</sup> and religious rights as conferred by the Establishment and Free Exercise Clauses of the First Amendment of the U.S. Constitution.<sup>23</sup> The principle that state interest in protecting the health and welfare of children may override parental rights and religious beliefs was powerfully characterized in *Prince v. Massachusetts*:

The right to practice religion freely does not include the liberty to expose the community or the child to communicable disease or the latter to ill health or death . . . Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.<sup>24</sup>

While these decisions make clear that states have no constitutional mandate to offer religious accommodation under state childhood immunization laws, the Supreme Court has not directly addressed the question of whether the Constitution allows states to offer religious-based exemptions.<sup>25</sup> However, the Court's extensive history of First Amendment accommodations in other contexts,<sup>26</sup> coupled with numerous state and lower federal court decisions, directly addressing constitutional issues of religious exemption provisions in state vaccination laws,<sup>27</sup> suggests childhood

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21. See, e.g., *Zucht v. King*, 260 U.S. 174, 176-77 (1922); *Hill v. Bd. of Educ. of Lansing*, 195 N.W. 95, 96-7 (Mich. 1923). Such laws are also derived from states' *parens patriae* interest. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: 1765 – 1769 \*47 (Philadelphia, Rees Welsh & Co. ed., 3d ed. 1897) (describing the office of chancellor, or lord keeper, as "the general guardian of all infants, idiots, and lunatics" in the kingdom); Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195, 207-08 (1978).

22. See, e.g., COMM. ON BIOETHICS, AM. ACAD. OF PEDIATRICS, *supra* note 6, at 257.

23. U.S. CONST. amend. I.

24. 321 U.S. 158, 166-67, 171 (1944).

25. Salmon & Siegel, *supra* note 10, at 291; Timothy J. Aspinwall, *Religious Exemptions to Childhood Immunization Statutes: Reaching for a More Optimal Balance Between Religious Freedom and Public Health*, 29 LOY. U. CHI. L.J. 109, 126-32 (1997).

26. Aspinwall, *supra* note 25, at 119-133. See generally Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992).

27. Salmon & Siegel, *supra* note 10, at 291-92.

immunization laws are not per se unconstitutional.<sup>28</sup>

Several states have had long-standing policies offering parents the ability to claim religious grounds to opt out of school vaccination and other health-related requirements. However, it was not until the early 1970's that almost universal implementation of state laws offering medical exemptions based on religious grounds occurred. The revolution was fueled by the passage of the Child Abuse Prevention and Treatment Act of 1974,<sup>29</sup> and other related regulations adopted by the United States Department of Health, Education, and Welfare, which conditioned federal funding upon passage of such exemptions. While later congressional and regulatory action repealed this mandate,<sup>30</sup> the effects of that law remain.

Today, forty-seven states continue to offer some form of religious exemption from school immunization laws.<sup>31</sup> Those states that have religious exemptions generally categorize the class of qualified exponents in one of two ways. A minority of states limit their religious exemption to those who belong to "organized," "recognized" or "established" religions.<sup>32</sup> However, as a result of the Conscientious Objector cases arising out of the Vietnam War,<sup>33</sup> most states have removed such language from their statutes.<sup>34</sup> Some states now scrutinize a petitioner for religious

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28. Hodge Jr. & Gostin, *supra* note 3, at 40. See also discussion *infra* Parts II-IV.

29. 42 U.S.C. § 5101 (2003).

30. The Child Abuse Prevention and Treatment and Adoption Reform Act of 1983, 45 C.F.R. §§ 1340.1-1340.20, led to regulations stating:

Nothing in this part should be construed as requiring or prohibiting a finding of negligent treatment or maltreatment when a parent practicing his or her religious belief does not, for that reason alone, provide medical treatment for a child; provided, however, that if such a finding is prohibited, the prohibition shall not limit the administrative or judicial authority of the State to ensure that medical services are provided to the child when his health requires it. *Id.* at § 1340.2(d)(2)(ii).

31. Mississippi, West Virginia, and Arkansas are the exceptions. See discussion *infra* Part II.

32. See, e.g., 25 TEX. ADMIN. CODE § 97.62(2) (West 2001) ("A signed affidavit must be presented by the child's parent or guardian stating that the immunization conflicts with the tenets and practices of a recognized religious organization of which the applicant is an adherent or member.").

33. *United States v. Seeger*, 380 U.S. 163, 184 (1965) (holding both that a "religious belief" must answer affirmatively the following test: "does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?" . . . [where] "the claim of [an individual] that his belief is an essential part of a religious faith must be given great weight." ). See also *Int'l Soc'y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 439 (2d Cir. 1981) (holding "any belief that is 'arguably religious' is considered 'religious' for the sake of free exercise analysis." ).

34. *Sherr v. Northport-E. Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 91 (E.D.N.Y. 1987) (finding a requirement that applicants be "bona fide members of a recognized religious organization" to be violative of the Establishment Clause); *Dalli v. Bd.*

exemption to determine if the applicant's beliefs are "genuine and sincerely held,"<sup>35</sup> while other states merely require submission of a form, or an affidavit, stating opposition to vaccination based on religious grounds.<sup>36</sup> In 1976, the Kentucky Supreme Court ruled that limiting religious exemptions to children whose parents were members of "a nationally recognized and established church or religious denomination" passed constitutional scrutiny.<sup>37</sup> However, the Kentucky legislature has since rewritten the exemption statute. The revised statute no longer requires that applicants meet such a qualification.<sup>38</sup>

Three states (Arkansas, Mississippi, and West Virginia) offer no religious exemption from school immunization requirements. In declaring its state religious exemption statute unconstitutional,<sup>39</sup> the Mississippi Supreme Court recognized that the state had an "overriding and compelling public interest"<sup>40</sup> to protect children from harm, even when such rights conflicted with the religious rights of the parents seeking exemptions for their children. Harkening back to the "martyr" language of *Prince v. Massachusetts*, the court asked, "Is it mandated by the First Amendment to the United States Constitution that innocent children, too young to decide for themselves, are to be denied the protection against crippling and death that immunization provides because of a religious belief adhered to by a parent or parents?"<sup>41</sup> In addition, the court identified the inherent failure rates of vaccines as well as the benefits of herd immunity,<sup>42</sup> stating that the

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of Educ., 267 N.E.2d 219, 223 (Mass. 1971).

35. *Berg v. Glen Cove City Sch. Dist.*, 853 F. Supp. 651, 655 (E.D.N.Y. 1994). However, in the *Barber* case, the Second Circuit had some difficulty when attempting appropriately to discern the sincerity of an individual's religious beliefs:

Sincerity analysis seeks to determine the subjective good faith of an adherent . . . The goal, of course, is to protect only those beliefs which are held as a matter of conscience. Human nature being what it is, however, it is frequently difficult to separate this inquiry from a forbidden one involving the verity of the underlying belief.

*Barber*, 650 F.2d at 441.

36. Jennifer S. Rota et al., *Processes for Obtaining Nonmedical Exemptions to State Immunization Laws*, 91 AM. J. PUB. HEALTH 645, 645 (2001).

37. *Kleid v. Bd. of Educ.*, 406 F. Supp. 902, 903, 907 (W.D. Ky. 1976).

38. KY. REV. STAT. ANN. § 214.036 (Michie 2002).

39. *Brown v. Stone*, 378 So.2d 218, 224 (Miss. 1979), *cert. denied*, 449 U.S. 887 (1980).

40. *Id.* at 222.

41. *Id.* at 221.

42. Herd immunity is the protection bestowed upon a population against an infectious disease when a critical mass of that population is immune to the particular disease. Thomas May & Ross D. Silverman, 'Clustering of Exemptions' As A Collective Action Threat to Herd Immunity, 21 VACCINE 1048, 1048 (2003); Silverman & May, *supra* note 7, at 513. For examples of studies of herd immunity, see Susan King, *Increase in Congenital Rubella Occurrence After Immunization in Greece: Retrospective Survey and Systematic Review*, 319

exemption violated the Equal Protection rights of those children who did not qualify for exemption. According to the court, a religious exemption provision "would require the great body of school children to be vaccinated and at the same time expose them to the hazard of associating in school with children exempted under the religious exemption who had not been immunized as required by the statute."<sup>43</sup>

### III. ENFORCEMENT AND PHILOSOPHICAL EXEMPTION

Application, interpretation, and enforcement of exemption provisions varies widely from state to state, and from school district to school district within states, thereby impacting the effectiveness of state vaccination programs.<sup>44</sup> While some states and districts merely require (or accept) submission of a form, other states or school districts take a much more stringent approach. Some school districts scrutinize the sincerity of a parent's religious beliefs, and go so far as to fine principals \$2000 a day for having unvaccinated children in their schools.<sup>45</sup>

Exemptions to school vaccination requirements based on moral, philosophical, or personal grounds pose additional challenges to the enforcement and effectiveness of school immunization laws. At least seventeen states authorize such "philosophical" exemptions,<sup>46</sup> presenting parents with an even lower burden of proof than found in religious exemptions to gain a waiver from school requirements. Where available, parents are taking advantage of such exemptions with growing regularity; and in states offering both exemptions, the number of philosophical exemptions far exceeds the number of religious and medical exemptions.<sup>47</sup>

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BRIT. MED. J. 1462 (1999); E. J. Gangarosa et al., *Impact of Anti-Vaccine Movements on Pertussis Control: The Untold Story*, 351 LANCET 356 (1998); Paul E. Fine, *Herd Immunity: History, Theory, Practice*, 15 EPIDEMIOL REV. 265 (1993); Thomas L. Schlenker et al., *Measles Herd Immunity: The Association at Attack Rates with Immunization Rates in Preschool Children*, 267 JAMA 823, 827 (1992).

43. *Brown*, 378 So.2d at 223. *But see* *Turner v. Liverpool Cent. Sch.*, 186 F. Supp. 2d 187, 192 (N.D.N.Y. 2002) (describing how the New York State Legislature, in crafting a religious exemption to vaccination, implicitly supported the protection of an individual's ability to practice religion in spite of any additional risk such policies might place upon the vaccinated).

44. *Rota*, *supra* note 36, at 645; McNeil, *supra* note 1.

45. McNeil, *supra* note 1.

46. Salmon & Siegel, *supra* note 10, at 290. *See also* Silverman & May, *supra* note 7, at 516-17.

47. *See, e.g.*, Daniel R. Feikin et al., *Individual and Community Risks of Measles and Pertussis Associated with Personal Exemptions to Immunization*, 284 JAMA 3145, 3147 (2000) (demonstrating in Colorado an 83% increase in philosophical exemptions from 1987-1998, and that philosophical exemptions comprised 87% of total exemptions granted in 1998). *See also* Donald G. McNeil Jr., *When Parents Say No to Child Vaccinations*, N.Y.



Often those parents who apply for religious and philosophical exemptions will cluster together in one geographic area (e.g., proximity to a school or church, or in locations such as Vashon Island, Washington and Boulder, Colorado).<sup>48</sup> Recent studies have shown that clusters of exemptors, who are significantly more susceptible to contracting vaccine preventable illnesses, pose an increased risk of spread of disease not only to their unimmunized peers,<sup>49</sup> but also to the surrounding, largely vaccinated population.<sup>50</sup>

Even in states without philosophical exemptions, the lack of statutory authority, in at least twenty-three states, to challenge claims based on religious beliefs,<sup>51</sup> or the relaxed enforcement of existing rules,<sup>52</sup> allows virtually any applicant in such states to gain exemption. Thus, the protections offered by the mandatory immunization statute are further undermined. Parents wishing to offer additional proof that their opposition to exemption is for religious reasons can seek out the assistance of numerous web sites offering relevant Biblical quotations to include in letters of petition for exemption.<sup>53</sup> Also, for as little as \$1, parents can join mail-order religious groups, such as the tax-paying Congregation of Universal Wisdom, headquartered in the New Jersey Pine Barrens.<sup>54</sup>

TIMES, Nov. 30, 2002, at A1.

48. May & Silverman, *supra* note 42, at 1048. See also McNeil, *supra* note 47.

49. J.E. VAN STEENBERGEN, 49 MORBIDITY & MORTALITY WKLY. REP., MEASLES OUTBREAK - NETHERLANDS, APRIL 1999-JANUARY 2000, 299, 300-01 (Apr. 14, 2000); Lee Siegel, *Whooping Cough Spreads Through Utah; 30 of the Hundreds Exposed Are Polygamous Family Members*, SALT LAKE TRIB., Sept. 12, 1998, at 81; D.V. Rodgers et al., *High Attack Rates and Case Fatality During a Measles Outbreak in Groups with Religious Exemption to Vaccination*, 12 PEDIATRIC INFECTIOUS DISEASE J. 268, 268 (1993); Feikin et al., *supra* note 47, at 3145-50.

50. Feikin et al., *supra* note 47, at 3147; Daniel A. Salmon et al., *Health Consequences of Religious and Philosophical Exemptions from Immunization Laws: Individual and Societal Risk of Measles*, 282 JAMA 47, 47 (1999). See also Norma Wagner, *Unvaccinated Kids Likely to Hike Risk for Others*, SALT LAKE TRIB., Aug. 22, 1999, at C1.

51. "In 23 states, no authority was given by the state to deny an exemption." Rota, *supra* note 36, at 647.

52. Twenty-one states have never denied a religious exemption claim. *Id.* See also McNeil, *supra* note 1.

53. *But see* Farina v. Bd. of Educ. of N.Y., 116 F. Supp. 2d 503, 508 (S.D.N.Y. 2000) (declining to accept the sincerity of a religious exemption claim from a Roman Catholic mother whose rationale for seeking exemption appeared to closely mirror phrases found on Internet sites promoting language to include in petitions for religious exemptions).

54. McNeil, *supra* note 1. Dr. Walter P. Schilling, a chiropractor and founder of the Congregation of Universal Wisdom, claims the church has 5520 members of "mostly families wanting to avoid vaccination," in twenty-eight states. *Id.* According to the article, membership merely requires sending Dr. Schilling a letter stating the writer "will aspire to live by" the tenets of the congregation. *Id.* Dr. Schilling is not too picky about an applicant's aspirations, as "he accepted a vague letter saying an applicant could follow the tenets if he chose to." Also, membership requires paying at least \$1 toward the "customary donation" of \$75 dollars. *Id.* For more on how the Congregation of Universal Wisdom may

These revelations come at a time when courts in a number of states have handed down decisions that drastically and detrimentally alter the protections available by way of state vaccination laws. In New York, for example, the hurdles to qualifying for religious exemption have practically been removed. In Wyoming, investigation of exemption requests has been eliminated altogether. In Arkansas, two separate courts struck down the state religious exemption provision, setting the state's childhood vaccination system up for a potentially far less effective replacement.<sup>55</sup>

### A. *The Empire Strikes Out*

In 1989, New York State was forced to revise its immunization exemption statute after a U.S. district court held that requiring an exemption applicant to be a "bona fide member of a recognized religious organization" violated the Equal Protection and Free Exercise Clauses of the First Amendment.<sup>56</sup> Consequently, school administrators wishing to challenge an exemption application under the revised law<sup>57</sup> were forced to closely examine the genuineness and sincerity of the applicant's religious beliefs, and discern whether such beliefs were religious, or merely philosophical or scientific in nature. In subsequent years, the court continued to uphold school districts' strict interpretations of "religious" beliefs, and permitted close scrutiny of claims by parents that their beliefs derived from their religious convictions.<sup>58</sup> Furthermore, New York courts previously had found unconvincing claims that an exemption request based upon beliefs espoused by a church founded on chiropractic ethics met the threshold for qualification as "a religious organization whose teachings are contrary to [immunization]."<sup>59</sup>

However, recent decisions by New York courts throw into question the wisdom of school districts expending the resources to challenge even

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pass school board and court scrutiny for qualification as a religion under state exemption laws, see *Turner v. Liverpool Cent. Sch. Dist.* *infra* note 60.

55. See discussion *infra* Parts III.A-IV.

56. *Sherr*, 672 F. Supp. at 99.

57. N.Y. PUB. HEALTH § 2164(9) (McKinney 2002).

58. See, e.g., *Farina*, 116 F. Supp. 2d at 508 (finding unpersuasive a family's repeated claims, which included citation to multiple passages from the Bible, that vaccination violated their Roman Catholic beliefs, concluding "much of the testimony of both the plaintiffs and the witnesses, as well as significant portions of several documents in evidence, struck the Court as the product not of the plaintiffs own deeply held conviction, but rather more plausibly as expressions the plaintiffs borrowed from outside sources in their effort to obtain the exemption.").

59. *Mason v. General Brown Cent. Sch. Dist.*, 851 F.2d 47, 50 (2d Cir. 1988) (holding that parents' sincere belief that immunization was unnecessary and contrary to "genetic blueprint" was simply embodiment of secular chiropractic ethics, rather than religious belief). *Id.* at 51.

tenuously supported claims of religious exemption. In *Turner v. Liverpool Cent. Sch. Dist.*,<sup>60</sup> Kelly Turner, arguing individually and on behalf of her minor daughter, Victoria, asserted that the school district, by failing to provide her daughter with a religious exemption, violated Victoria's state and federal constitutional rights. Kelly Turner and her daughter were members of the Congregation of Universal Wisdom, a church founded on the principles of the chiropractic ethic.<sup>61</sup> Over the course of fifteen months, the Turners challenged the school district's decision in several hearings and appealed up the State Department of Education hierarchy.<sup>62</sup> After being denied the exemption throughout the administrative process, the Turners appealed to the court for relief, which included asking for a preliminary injunction and the right to a trial.<sup>63</sup>

To grant the Turners' claim for a religious exemption, the court had to engage in a two-prong analysis: (1) Is the belief religious?; and (2) Is the belief sincerely held?<sup>64</sup> In making such a determination, a judge cannot assess the credibility of the claims. A judge must take any arguably religious belief to be religious in nature. He or she does not need to find that the belief falls in line with any particular dogma, but rather must only find by a preponderance of the evidence that the belief is genuinely and sincerely held.<sup>65</sup>

In *Turner*, the court found all of the following, which would suggest a similar holding to that found in *Mason*: (a) the church was closely associated with chiropractic;<sup>66</sup> (b) the church held no regular meetings; (c) Kelly Turner had a limited knowledge of church tenets and vacillated in her answers as to meanings of such tenets; (d) she had a history of inconsistent action regarding her beliefs and medical care proscribed by church beliefs; and (e) her testimony with regard to vaccination had been "inconsistent and ever evolving."<sup>67</sup> Despite these findings, the court ruled in favor of the

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60. No. 30, slip op. at 18 (S.D.N.Y., Mar. 8, 2001) (Mem.-Decision and Order), N.Y.L.J., Mar. 20, 2001, at 29.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* See also *Farina*, 116 F. Supp. 2d at 507.

65. *Turner*, slip op. at 18.

66. According to the court, during the first preliminary injunction hearing, the plaintiff acknowledged that the tenets of her religion were similar to the views held by "some chiropractors." *Id.* at 29. Plaintiff also acknowledged that since 1990 her employment has been primarily in the chiropractic field as a chiropractic assistant. *Id.* Plaintiff testified that the main type of "physical service" that the Congregation engages in is the "laying on of the hands on the vertebrae," which is performed by congregants who "happen to be chiropractors." *Id.* Additionally, Plaintiff acknowledged that the Congregation had been founded by chiropractors and is currently led by chiropractors. *Id.*

67. *Id.*

Turners, finding that Kelly's belief was both religious and sincerely held.<sup>68</sup> Though many of the central doctrines of the Congregation appeared to have been taken directly from a book titled *Chiropractic First* (e.g., belief in a "universal wisdom or life force"), and precedent in New York had held that beliefs grounded in chiropractic were scientific rather than religious in nature, the court did not conclude that they were therefore ineligible for religious exemption from state immunization laws.<sup>69</sup> The court found that "the one consistent aspect of [p]laintiff's testimony was that she believed in a universal life force or wisdom and that immunization would be violating that life force" was enough to warrant granting the plaintiff relief.<sup>70</sup>

In association with the above cause of action, the Turners also filed a civil rights claim against the Liverpool Central School District. In response to that claim, the school district filed motions to dismiss and for summary judgment.<sup>71</sup> The school district argued that the state's religious exemption clause violated the Establishment Clause, as it failed all three prongs of the *Lemon* test.<sup>72</sup> Specifically, they argued that: (1) the exemption failed to have a secular purpose, (2) the law's primary effect was to advance participation in religious life, and (3) the law led to excessive government entanglement with religion.<sup>73</sup> The court denied the school district's motions, finding that the statute met the *Lemon* test burdens.<sup>74</sup>

By accepting such a low threshold to qualify for religious exemption, the *Turner* case sets a dangerous precedent for future application of exemption request review, both by courts and school districts. Under this interpretation of "sincerely" held beliefs, applicants need not be consistent with their professed faith in deed or word. All they need to do is utter magic words indicating some degree of spirituality in their life and stick to their story to pass an examination. Furthermore, because of the *Turner* court's broad interpretation of what constitutes "religious," the court has blurred the distinctions between those beliefs that are traditionally considered "moral," "scientific," "personal," or "philosophical" and those that are deemed "religious." It becomes difficult, if not impossible, for a school district to deny one belief and accept another. Furthermore,

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68. *Id.*

69. *Mason*, 851 F.2d at 5. Furthermore, while the *Turner* court accepted chiropractic philosophy as grounds for religious exemption at least in theory, *Turner*, slip. op. at 18, other states have determined that doctors of chiropractic may not be considered appropriate sources for affidavits attesting to the need of a child for medical exemptions. See, e.g., 74 Op. Ky. Att'y Gen. 758 (1974).

70. *Turner*, slip. op. at 18.

71. *Turner*, 186 F. Supp. 2d at 190.

72. See *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971).

73. *Turner*, 186 F. Supp. 2d at 191.

74. *Id.* at 193.

absent strong financial incentives to act otherwise, school districts, faced with persistent budget woes<sup>75</sup> and a low likelihood of having their denial upheld, may in the future opt to forgo close examination of applications. In order to find relief from such a situation, changes likely will need to be legislative rather than judicial.

### *B. LePage Out of the Wrong Playbook*

While two New York courts saw problems arise concerning how schools assessed the genuineness and sincerity of a parent's application for religious exemption, the Wyoming Supreme Court, in *LePage v. Wyoming*<sup>76</sup> and *Jones v. Wyoming St. Dept. of Health*,<sup>77</sup> saw problems with schools conducting any assessment.<sup>78</sup>

In *LePage*, Ms. LePage wrote a letter to the state health department seeking an exemption for her daughter from receiving the Hepatitis B vaccination stating, "We, the parents of . . . are petitioning for religious exemption of the Hepatitis B vaccine. Because of the strong religious beliefs of our family, we do not believe our daughter will engage in behavior that involve[s] exposure to blood or body fluids. We believe that the instituting of mandatory Hepatitis B vaccines is the direct result of our children growing up in a declining moral culture."<sup>79</sup>

The state health officer asked for more information to help further clarify the LePage family's religious beliefs in order to better assess whether the family acted upon those beliefs in a manner consistent with the religious exemption request.<sup>80</sup> Upon review, the request by the LePage family was denied.<sup>81</sup> The family appealed the decision, stating that it had come to believe that vaccines were not "God's will for our lives."<sup>82</sup> The Wyoming Department of Health upheld the health officer's decision.<sup>83</sup> The LePages then took their grievance to court, arguing that the duty of the state under the Wyoming immunization statute exemption provisions was ministerial, not discretionary. The Department of Health countered that it needed to review the exemption request to distinguish between exemptions founded

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75. See Robert Pear, *States are Facing Big Fiscal Crises, Governors Report*, N.Y. TIMES, Nov. 26, 2002, at A1.

76. *LePage v. Wyoming*, 18 P.3d 1177, 1181 (Wyo. 2001).

77. *Jones v. Wyoming St. Dep't of Health*, 18 P.3d 1189, 1194 (Wyo. 2001).

78. *Id.*; *LePage*, 18 P.3d at 1181.

79. *LePage*, 18 P.3d at 1178.

80. *Id.*

81. *Id.*

82. *Id.* at 1179.

83. *Id.*

on religious beliefs, and those that were merely philosophical in nature.<sup>84</sup>

In *Jones*,<sup>85</sup> middle-school student Keith Jones requested a medical exemption from the immunization statute, based upon a physician's indication on the Department of Health's medical waiver request form that Jones had a history of reactions to immunizations. The Department of Health reviewed the waiver request, as well as Jones's immunization history, and noticed that the applicant had previously received five DTP vaccinations, five polio vaccinations, one MMR vaccination, and one HIB vaccination. In the box on the immunization record with the title "Allergies/Reactions" was a notation of "NKA," or "no known allergies." The Department of Health requested additional information about Jones' medical history, and when they received no more than the physician's assertion that Jones had had adverse reactions to vaccines in the past, the Department denied the waiver request. It found that the Joneses had "failed to establish a medically recognized contraindication to immunizations."<sup>86</sup>

However, in both cases, the Wyoming Supreme Court subsequently overturned the decisions by the Department of Health.<sup>87</sup> Both cases centered on the same section of Wyoming law, which states: "Waivers *shall be authorized* by the state or county health officer upon *submission* of written evidence of religious objection or medical contraindication to the administration of any vaccine."<sup>88</sup> According to the Wyoming courts, the statute mandates the issuance of a waiver upon receipt of a written application; it does not allow the Department to investigate either the medical history or the sincerity of the religious beliefs of the applicant.<sup>89</sup>

Exemption statutes lacking processes by which to authorize review mechanisms leave states unprotected against fraudulent claims of qualification. As confirmed in recent studies, such systems undermine the effectiveness of public health protections available through mandatory childhood immunizations and places those who wish to receive the protections of both vaccination and herd immunity at greater risk.<sup>90</sup> Health officials in states lacking enforcement powers must redouble their efforts to educate parents on the benefits of vaccination, in order to counterbalance any temptation of undecided or unmotivated parents taking the easier path through exemption.

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84. *Id.* at 1178.

85. *Jones*, 18 P.3d at 1191-92.

86. *Id.* at 1192.

87. *Id.* at 1194; *LePage*, 18 P.3d at 1181.

88. WYO. STAT. ANN. § 21-4-309(a) (Michie 2002) (emphasis added).

89. *LePage*, 18 P.3d at 1181; *Jones*, 18 P.3d at 1194.

90. Feiken et al., *supra* note 47, at 3145-150.

### C. Arkansas Blues

In mid-2002, two Arkansas cases, *Boone v. Boozman*<sup>91</sup> and *McCarthy v. Boozman*,<sup>92</sup> resulted in the elimination of the state's religious exemption clause. They placed Arkansas on the front lines of the debate over how best to construct a vaccination law that balances individual rights with ample public health protections.

In both cases, the plaintiffs sought religious exemptions from the state's Hepatitis B vaccination requirement. On his application for exemption, McCarthy did not state a church affiliation; however, he wrote that he felt that people have God-given immune systems, and the body should not be defiled with immunizations.<sup>93</sup> The Boone family based their exemption request upon "religious reasons and on conscientious grounds which include traditional parenting concerns."<sup>94</sup>

Under the Arkansas statute, upon submission of the application, the Department of Health assigns an employee to screen the religious exemption application to determine whether the applicant satisfies the statute's "recognized" religion requirement. If so, they then proceed to decide whether the "tenets and practices" of said religion "conflict" with the immunization program.<sup>95</sup> Judge Robert T. Dawson, who presided over the *McCarthy* case, describes the decision making process of the Department of Health screener as follows:

The health department official decides whether to grant a religious exemption by considering several factors including the permanent address of the applicant's church; the number of church members; the times and places of regular meetings; the written church constitution or plan of organization; the written theology or statement of beliefs; and any legal documents the church has filed with governmental entities. The application form requests copies of documents filed with governmental entities; a written statement of the church or denomination specifying that immunization conflicts with religious tenets and practices; and a notarized statement from a church or denomination official reflecting that the applicant is currently a church member in good standing. The form requests everything but information concerning the applicant's pew-seating preferences.<sup>96</sup>

When their applications were denied, the plaintiffs filed action in federal

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91. *Boone v. Boozman*, 217 F. Supp. 2d 938 (E.D. Ark. 2002).

92. *McCarthy v. Boozman*, 212 F. Supp. 2d 945 (W.D. Ark. 2002).

93. *McCarthy*, 212 F. Supp. 2d at 947.

94. *Boone*, 217 F. Supp. 2d at 942.

95. ARK. CODE ANN. § 6-18-702(d)(2) (Michie 2002).

96. *McCarthy*, 212 F. Supp. 2d at 947.

court, arguing that the statute's "recognized" religion requirement violated their Constitutional rights under the Establishment and Free Exercise Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.<sup>97</sup> The courts agreed.<sup>98</sup> While Judge Dawson was sympathetic to the state's interest in guarding against moral objections to or general fears of immunization, he held that limiting the rights under the statute to those in "recognized" religions failed the *Lemon* three-prong test.<sup>99</sup> Accordingly, religious exemptions are no longer available in Arkansas. The only solution remaining, should the state wish to offer an exemption, is for the legislature to pass a provision that is religion-neutral.<sup>100</sup>

Why should these decisions merit greater national attention than, say, the earlier Massachusetts<sup>101</sup> or New York<sup>102</sup> decisions striking down their formerly narrow religious exemption provisions? Over the past several years, advocates with concerns about the U.S. vaccination program have been using various approaches to attempt to loosen state vaccination requirements or spur the expansion of the panel of recommended vaccines. A number of states have seen bills proposed that would add philosophical grounds to the state exemption laws.<sup>103</sup> Others have challenged the addition of the varicella (Chicken Pox) vaccine to the mandate list by threatening to take legal action disputing the right of the state health board to expand the vaccine panel to include an illness with relatively low morbidity and mortality, and a vaccine that is not as effective as once believed.<sup>104</sup>

Furthermore, with at least five other states still having "recognized" religion language in their vaccination statute,<sup>105</sup> all that would be needed to incite a conflict is for a school in one of those five states to deny an exemption based on "unrecognized" religion grounds. Concocting test

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97. *Id.* at 947-48.

98. *Id.* at 950.

99. *Id.* at 948-49 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)).

100. This is according to the police power, whereby only a state legislature can create an exemption.

101. *Dalli v. Bd. of Educ.*, 267 N.E. 2d 219, 222-23 (Mass. 1971).

102. *Sherr*, 672 F. Supp. at 99.

103. Silverman & May, *supra* note 7, at 513-14.

104. Dave McKinney, *Vaccination Bill Debated; Critics Contend Mandated Shots Put Kids at Risk*, CHI. SUN-TIMES, Mar. 31, 1999, at 9. See also Karin Galil et al., *Outbreak of Varicella at a Day-Care Center Despite Vaccination*, 347 NEW ENG. J. MED. 1909, 1909 (2002); Marietta Vazquez et al., *The Effectiveness of the Varicella Vaccine in Clinical Practice*, 344 NEW ENG. J. MED. 955, 955 (2001); Lanie Friedman Ross & J.D. Lantos, *Immunization Against Chickenpox*, 310 BRIT. MED. J. 2, 2 (1995).

105. ARIZ. REV. STAT. § 36-883(c) (2002); HAW. REV. STAT. ANN. § 325-34 (Michie 2002); IOWA CODE § 139A.8(4)(b) (2002); NEB. REV. STAT. § 79-221(2) (2002); and 25 TEX. ADMIN. CODE § 97.62(2) (West 2001).



cases<sup>106</sup> to eliminate current exemption provisions and open a broader debate over state childhood immunization policies appears to be a viable and likely successful advocacy strategy. Rather than shrink away from denying cases that are invalid under state law (which would be one way to avoid losing the religious exemption language, flawed as it might be), public health advocates should begin a dialogue before current provisions are overturned. They should work in concert with all interested parties to ensure that public health protections are not lost to skepticism.

#### IV. PROPOSALS AND CONCLUSION

As childhood vaccination exemption rates continue to increase and more parents take advantage of unenforced, ineffective, and overbroad exemption provisions, proactive and collaborative solutions are needed to ensure protection of the public's health. The goal should not be to eliminate the ability of those seeking exemption to receive relief under the law,<sup>107</sup> since such an approach would exacerbate feelings of animosity and skepticism toward vaccination and the public health system in general.<sup>108</sup> Instead, one goal should be to improve public knowledge of the benefits and remote risks of childhood immunizations, as well as the public health risks posed by those refusing vaccinations. Improvement could be made in the knowledge of health professionals, school officials, and especially school nurses, concerning application of state exemption laws.<sup>109</sup>

In their research on the processes for obtaining exemptions, Jennifer Rota and colleagues found that few states actively investigate the sincerity of the beliefs of applicants. In reality, most states make it easier for applicants to claim an exemption than to fulfill the childhood vaccination requirements.<sup>110</sup> Several steps can be taken to reverse such incentives without necessitating large financial investments by schools and public

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106. See, e.g., *Parents Sue School District to Exempt Son from Policy*, Hous. Chron., Dec. 9, 1998, at 35 (where parents of "independent" convictions sued their son's school district after the boy was denied services through the school).

107. Comm. on Bioethics, Am. Acad. of Pediatrics, *Religious Objection to Medical Care*, 99 PEDIATRICS 279, 280 (1997).

108. GRAD, *supra* note 14, at 72-3. See also LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY AND RESTRAINT 185-87 (2000); and ROBIN M. HENIG, THE PEOPLE'S HEALTH: A MEMOIR OF PUBLIC HEALTH AND ITS EVOLUTION AT HARVARD 121-22 (1996), for their discussions of the "Swine Flu Affair" and its effect on public trust in vaccination and the public health system. In addition, some public health officials fear that side effects arising out of the new smallpox vaccination initiative could result in an increased apprehension about childhood vaccinations. Anita Manning, *Public Confidence in Vaccines at Risk*, USA TODAY, Dec. 2, 2002, at 8D.

109. Rota, *supra* note 36, at 648.

110. *Id.*

health systems. In addition, these steps are within constitutional limits.

First, any applicant wishing to apply for an exemption should be required to undergo an "informed refusal" process.<sup>111</sup> Prior to receiving an exemption, applicants would meet with a health professional (e.g. public health officer, school nurse, or primary care provider) to discuss the relative risks and benefits of immunization and exemption. This interaction would need to be memorialized on a standardized form. States should also require those seeking non-medical exemptions to renew their exemptions, perhaps not annually, but certainly with greater regularity than most states currently require.<sup>112</sup> Improvements could also be made to the process through which new vaccines are added to the required vaccine panel.

Finally, with the use of immunization registries and improved communicable disease-tracking capacities, arising out of current bioterrorism preparedness efforts, policies should allow states to remain flexible in responding to childhood disease outbreaks, and retain the power to restrict exemptions or require vaccination as needed. By approaching these issues before circumstances demand emergency responses, childhood vaccinations can continue to preserve the public health as well as the rights of individuals.

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111. The doctrine of "informed refusal" first appeared in *Truman v. Thomas*, 27 Cal.3d 285 (Cal. 1980). In *Truman*, "informed refusal" described an affirmative duty on the part of physicians as part of their adherence to the standard of care. *Id.* at 291. My intent is to use the phrase more broadly to describe an affirmative duty on the part of the guardian of the child seeking exemption to hold an exemption-specific conversation with a health care provider, and then to present evidence of such a conversation to exemption-granting authorities. According to Dr. Jon Abramson, this approach has been discussed by some pediatric medicine policymakers; however, thus far, no formal policy has been offered. Dr. Jon Abramson, Remarks at the 36<sup>th</sup> National Immunization Conference of the Centers for Disease Control and Prevention, (Apr. 29, 2002) (on file with author). *Cf.* IND. CODE § 16-34-2-1.1(1) (requiring a pregnant woman to receive in-person counseling with a health care provider prior to receiving an abortion); *A Woman's Choice – E. Side Women's Clinic v. Newman*, 305 F.3d 684 (7<sup>th</sup> Cir. 2002), *cert. denied*; *A Woman's Choice – E. Side Women's Clinic v. Brizzi*, 2003 U.S. LEXIS 1173 (2002). Under both circumstances, a care provider's participation and adherence to some minimum content standard is required; however, the greater burden proposed in the case of childhood exemption "informed refusal" is upon the person seeking exemption rather than the provider.

112. See *Rota et al.*, *supra* note 36, at 646. 34 states never require renewal of exemption, while another 9 states only required renewal upon transfer to another school.